

ADM File No. 2010-15

September 30, 2011

Mr. Corbin Davis  
Clerk, Michigan Supreme Court  
PO Box 30052  
Lansing, MI 48909

Re: ADM File No. 2010-15  
Proposed Amendment to MCR 6.005

Dear Mr. Davis and Justices of the Supreme Court:

I am writing in support of the proposed amendment to MCR 6.005, clarifying the scope of a criminal defense counsel's responsibility. The specific proposal, which would require a defense attorney at trial to retain a file for at least five years after disposal of the case in the trial court, and to make the file available for copying upon request of appellate defense counsel, would be beneficial to both appellate prosecutors and appellate defense counsel.

We frequently get requests from appellate defense counsel for copies of materials in our file. Typically, we deny such requests. There is no rule governing discovery on appeal. With the exception of copies of exhibits (which trial defense counsel may not have retained, or may not have a copy which identifies it as the precise exhibit introduced at trial), and the obvious requirement to reveal exculpatory material we discover on appeal (something that has not happened in my experience, but certainly could happen), we take the position that it is up to trial defense counsel to supply appellate defense counsel with the requested materials.

We do not do this to be difficult. This is an issue of practicality. Copying material, going through a file and determining what would be discoverable and what is not, excluding work product material, involves time and expense that we simply cannot afford.

I nonetheless sympathize with the problems faced by defense counsel on appeal. An attorney undertaking a criminal appeal (or for that matter any appeal) needs to look at the entire file. A review of the transcripts, sufficient in many cases, may not be sufficient in all cases. If I were a criminal appellate defense lawyer, I would want to review all police reports and witness statements, even those not referenced in the transcript. I have been told by many defense appeals attorneys that they first try to get materials from trial defense counsel, but often get no cooperation. In my experience SADO is particularly good at first trying to get materials from trial defense counsel, but often runs into

roadblocks. Requiring trial counsel to retain the file, and to make it available to defense counsel on appeal, would create no burden on trial counsel (whose responsibility is only to make his or her file available for copying, not to undergo the expense of copying), and would be beneficial to appellate defense attorneys as well as appellate prosecutors.

Thank you for the opportunity to present my views on this proposal.

Sincerely yours,

Timothy K. McMorrow  
Chief Appellate Attorney  
Kent County Prosecutors Office

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